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Recommended Citation

Richard C. Ausness, *Paying for the Health Costs of Smoking: Loss Shifting and Loss Bearers*, 27 Sw. U. L. Rev. 537 (1998).

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Notes/Citation Information

Southwestern University Law Review, Vol. 27, No. 3 (1998), pp. 537-575.

PAYING FOR THE HEALTH COSTS OF SMOKING: LOSS SHIFTING AND LOSS BEARING

Richard C. Ausness*

I. INTRODUCTION

Cigarette smoking is known to cause cancer, heart disease, and respiratory problems.¹ Smoking is the leading cause of lung cancer² and is also responsible for most cases of larynx, mouth, and throat cancer.³ In addition, smoking is thought to cause kidney, bladder, pancreatic, stomach, and cervical cancer.⁴ Moreover, smoking contributes to coronary heart disease, arteriosclerotic peripheral vascular disease, and aortic atherosclerosis.⁵ Smoking also has been linked to various chronic obstructive lung diseases such as chronic bronchitis and emphysema.⁶ Finally, smoking is suspected of causing impaired vision, old-age retinal degeneration, reduced fertility, early menopause, and even hearing loss.⁷

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1. See Darren S. Rimer, *Secondhand Smoke Damages: Extending a Cause of Action for Battery Against a Tobacco Manufacturer*, 24 Sw. U. L. Rev. 1237, 1243 (1995) ("Cigarette smoking causes 87% of lung cancer, 82% of chronic obstructive pulmonary disease deaths, 21% of coronary heart disease deaths, and 18% of stroke deaths.").

2. See OFFICE ON SMOKING & HEALTH, U.S. DEP'T. OF HEALTH & HUMAN SERVS., THE HEALTH BENEFITS OF SMOKING CESSATION, A REPORT OF THE SURGEON GENERAL 107 (1990).

3. See U.S. DEP'T. OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: CANCER, A REPORT OF THE SURGEON GENERAL at vi (1982).

4. See *id.*

5. See PUBLIC HEALTH SERV., U.S. DEP'T. OF HEALTH, EDUC. & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING, CARDIOVASCULAR DISEASE, A REPORT OF THE SURGEON GENERAL at iv-vi (1983).

6. See PUBLIC HEALTH SERV., U.S. DEP'T. OF HEALTH, EDUC. & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE, A REPORT OF THE SURGEON GENERAL at vii (1984).

7. See Lee Nelkin, Note, *No Butts About It: Smokers Must Pay for Their Pleasure*, 12 COLUM. J. ENVTL. L. 317, 317 (1987).

These health costs are enormous, amounting to more than \$50 billion per year.⁸ Although some of these costs are borne by smokers, many of them are externalized to nonsmokers.⁹ For example, nonsmokers who obtain first-party health insurance often pay the same rates as smokers even though smokers receive more health-care services than nonsmokers.¹⁰ The same is true of publicly financed health-care programs such as Medicaid; nonsmokers typically pay a greater amount into these programs than smokers.¹¹

Recently, a number of states have sued tobacco companies in order to recover the costs of treating smoking-related diseases through their Medicaid programs.¹² At the present time, the parties have agreed to a settlement that obligates the tobacco companies to pay billions of dollars to the states over the next twenty-five years. In addition, a number of class action suits have been brought against tobacco companies by various groups of injured parties. The tobacco companies have been forced to settle one of these suits and several others are as yet unresolved. All of this suggests that tobacco companies, who traditionally have avoided liability for smoking-related injuries, are now going to have to pay for some of the health costs of smoking. In other words, some of the losses associated with smoking are going to be shifted from individual smokers and others who currently bear them to tobacco companies and their customers.

The purpose of this Article is to examine this loss-shifting process in more detail. The Article is largely concerned with the mechanisms by which losses are to be shifted from one party to another and the substantive rules that dictate when, from whom, and to whom losses will be shifted.

Part II surveys recent developments in the area of tobacco liability and describes some of the loss-shifting plans that have been proposed during the past two decades. Part III identifies a number of policy considerations that are relevant to loss-shifting. These include resource-allocation efficiency, loss-spreading, corrective justice, and

8. See Mark D. Fridy, Note, *How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking: A Look at the Next Wave of Suits Against the Tobacco Industry*, 72 IND. L.J. 235, 237 (1996) (estimating the health costs of smoking at \$50 billion).

9. See Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405, 405 (1991).

10. See Note, *Plaintiff's Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809, 823 (1986).

11. See Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 272-73 (1977).

12. See generally Fridy, *supra* note 8, at 235-36.

vindication. Part IV examines a variety of loss-shifting approaches which can be used to determine who should ultimately be held responsible for smoking-related health costs. Finally, Part V sets forth a proposal to reimburse public providers of social services for the costs of treating injured smokers for smoking-related diseases. This program is to be financed by an excise tax on the retail sale of cigarettes.

II. LOSS-SHIFTING AND THE TOBACCO INDUSTRY

Over the years, legal scholars have urged that smoking-related losses be shifted from individual victims to tobacco companies and their customers and have developed a number of proposals to achieve this goal. But none of these schemes has ever been implemented. Recently, however, tobacco companies have been forced to settle a number of significant cases. If this trend continues, tobacco companies face the prospect of unlimited tort liability. Under these circumstances, the chances of a legislative solution to the loss-shifting issue appear to be much better than they were a few years ago.

A. *Past Loss-Shifting Proposals*

For more than a quarter of a century, legal commentators have proposed various administrative schemes to provide compensation to victims of smoking-related injuries. Some of these proposals allow claims to be brought directly against tobacco companies in a quasi-judicial administrative proceeding; other proposals rely on revenues from excise taxes as a source of compensation.

1. Civil Liability Systems

Professor Frank Vandall has proposed a civil liability scheme that would avoid many of the problems of a pure tort law approach.¹³ Under Professor Vandall's proposal, cigarette manufacturers would be subject to "absolute liability" for certain smoking-related injuries.¹⁴ This means that tobacco companies would not be able to invoke any defense, such as assumption of risk, contributory negligence, or product misuse, to defeat a plaintiff's right to recover.¹⁵ A causal relationship between smoking and cancer would be presumed to exist for claimants who have smoked at least one pack of cigarettes a day for

13. See Vandall, *supra* note 9, at 423-33.

14. See *id.* at 423.

15. See *id.* at 425.

fifteen years.¹⁶ Furthermore, this presumption could only be rebutted by uncontradicted, clear, convincing, and unimpeached evidence.¹⁷

Professor Vandall's compensation plan would provide benefits for lung cancer and cancer of the larynx, oral cavity, or esophagus.¹⁸ Compensation would be limited to these four diseases because they are the diseases that are most commonly associated with smoking.¹⁹ In order to apply for compensation, the claimant would have to submit a statement from a physician that declared the claimant was suffering from one of these forms of cancer and that the claimant's condition was probably caused by smoking.²⁰

The claimant would be permitted to recover for medical expenses, lost wages, and up to \$100,000 for pain and suffering.²¹ However, punitive damages would not be allowed under this proposal.²² If the injured party's medical expenses were covered by first-party insurance, the insurance company would be reimbursed for any medical expenses paid to hospitals or doctors,²³ and the victim would be allowed to recover for any deductibles or co-payments paid to the insurer.²⁴

Professor Donald Garner has offered a similar proposal.²⁵ Under what Professor Garner calls a "civil adjudication" approach, welfare agencies would be permitted to sue cigarette companies to recover any direct medical costs and transfer payments attributable to smoking-related illnesses.²⁶ These cases would be decided by a special administrative tribunal, similar to a workers compensation board.²⁷ Plaintiffs in these proceedings would be able to avail themselves of certain presumptions about smoking and cancer.²⁸ In addition, when a patient has smoked several brands of cigarettes, the special administrative tribunal could hold tobacco companies proportionately liable

16. *See id.* at 424.

17. *See id.* at 432.

18. *See id.*

19. *See id.*

20. *See id.* at 423-24.

21. *See id.* at 424.

22. *See id.*

23. *See id.* at 425.

24. *See id.*

25. *See Garner, supra* note 11, at 314-19.

26. *See id.* at 314.

27. *See id.* at 319.

28. *See id.* at 315.

based on the number of cigarettes of each brand that the patient smoked.²⁹

Recently, Professor Jon Hanson and Professor Kyle Logue have proposed a smokers' compensation system under which smokers, families of smokers, and those with subrogation claims could bring their claims before an administrative board.³⁰ The Hanson-Logue proposal is intended to establish an incentive-based system that forces the tobacco industry to internalize smoking-related health costs.³¹ Under the Hanson-Logue proposal, the board would determine if cigarette smoking caused the claimant's injury, possibly using presumptions in the case of such signature diseases as lung cancer.³² The board would also attempt to establish which cigarette brand or brands were responsible for the claimant's injury.³³ Finally, the board would determine the claimant's damages and pro-rate them among the various tobacco companies whose products were consumed by the claimant.³⁴

2. Compensation Plans Financed by Excise Taxes

Other commentators rely on taxation, rather than civil liability, to provide compensation for smoking-related injuries. For example, Dean Paul LeBel has proposed the establishment of a "tobacco injury compensation program."³⁵ This plan would be funded by a tax on tobacco products.³⁶ Both smokers and nonsmokers would be compensated for tobacco-related injuries. Eligibility for compensation would be determined according to a statutory or administrative schedule of harms. The occurrence of one of the symptoms set forth in the sched-

29. *See id.* at 316.

30. *See generally* Jon D. Hanson & Kyle D. Logue, *THE COSTS OF CIGARETTES: THE ECONOMIC CASE FOR EX POST INCENTIVE-BASED REGULATION*, 107 *YALE L.J.* 1163, 1281-96 (1998). A more detailed compensation plan will be published later this year in the *Southern Illinois University Law Journal*. *See* Jon D. Hanson et al., *Smokers' Compensation: Toward a Blueprint for Federal Regulation of Cigarette Manufacturers*, 22 *S. ILL. U. L.J.* — (forthcoming Spring 1998).

31. *Id.* at 1281 ("Ex post incentive-based regulation . . . would harness market forces and manufacturer information to avoid the inefficiencies of the other regimes.").

32. *Id.* at 1287.

33. *Id.* at 1287-91.

34. The authors have suggested that determinations of individual causation, at least in the future, might be facilitated by the issuance of "cigarette cards" for smokers. This card, which would act somewhat like a credit card or an ATM card, could keep track of cigarette purchases by brand and thus allow the board to pro-rate liability among cigarette companies. *Id.* at 1291-95.

35. *See* Paul A. LeBel, *Beginning the Endgame: The Search for an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms*, 24 *N. KY. L. REV.* 457, 490-93 (1997).

36. *See id.* at 493.

ule would create a presumption that the claimant was entitled to compensation.³⁷ Individuals who were already covered by first-party insurance could recover any deductibles or co-payments they have paid out to their insurance companies.³⁸ In the case of uninsured victims, the tobacco injury compensation program would pay public health-care providers for medical services on a "pay-as-you-go" basis.³⁹ The proposed compensation scheme would also provide a small, largely symbolic, death benefit to the estates of individuals who have died from smoking-related diseases.⁴⁰

Professor Garner has also proposed that a tax be levied upon cigarettes.⁴¹ However, unlike Dean LeBel's proposal, the tax would not be uniform among all brands; instead, the Public Health Service would determine which brands were safer and which were more hazardous, and the tax rate would vary according to these determinations.⁴² The purpose of a graduated tax structure would be to encourage cigarette companies to make their products safer by giving those who did so a competitive advantage.⁴³ Money raised from the safety tax would pay for the costs of developing methods to determine the relative safety of cigarettes.⁴⁴ Additional money would be given to public welfare agencies to help pay for smoking-related welfare expenditures.⁴⁵

Another proposal, suggested by William Drayton, would tax the tar and nicotine content of cigarettes.⁴⁶ The purpose of this tax would be to encourage tobacco companies to make their products safer by reducing the amount of tar and nicotine in their cigarettes.⁴⁷ Producers who refused to develop low-tar and low-nicotine products would risk losing their market share to those competitors who produced lower, and thus cheaper, tar and nicotine cigarettes.⁴⁸ Under Mr.

37. *See id.* at 490.

38. *See id.* at 491.

39. *See id.* This would eliminate the need to calculate a lump-sum amount for future medical expenses. *See id.*

40. *See id.* at 492.

41. *See* Garner, *supra* note 11, at 327-32.

42. *See id.* at 327-28.

43. *See id.* at 327.

44. *See id.* at 328.

45. *See id.*

46. *See* William Drayton, Jr., *The Tar and Nicotine Tax: Pursuing Public Health Through Tax Incentives*, 81 YALE L.J. 1487, 1490-1516 (1972).

47. *See id.* at 1494.

48. *See id.* at 1495.

Drayton's proposal, tax proceeds would not be earmarked for compensation but would be used for general revenue purposes.

Finally, I have proposed a national tax and compensation scheme for smoking-related injuries.⁴⁹ This proposal calls for the creation of an administrative agency to hear adjudicated claims by injured smokers.⁵⁰ In order to avoid the cost of adjudicating complicated causation issues, the agency would be authorized to establish eligibility criteria based on the existence of certain diseases.⁵¹ The proposal would limit compensation for victims to pecuniary losses and would provide that disability benefits be based on uniform schedules.⁵² This compensation program would be financed by an excise tax on cigarettes that would be raised or lowered periodically, depending upon past claims experience.⁵³

B. Recent Developments

Until very recently, tobacco companies were able to claim that they had never settled a case or had an adverse judgment rendered against them.⁵⁴ In the 1960s, plaintiffs relied on negligence⁵⁵ and implied warranty⁵⁶ theories. However, tobacco companies avoided liability in such cases by claiming to have been unaware of the adverse health effects of smoking.⁵⁷ Later, injured smokers based their claims

49. See Richard C. Ausness, *Compensation for Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 36 WAYNE L. REV. 1085, 1124-33 (1990).

50. See *id.* at 1125.

51. See *id.* at 1127-28.

52. See *id.* 1129.

53. See *id.* at 1131-32.

54. See Charles S. Griffith, III, *The Legacy of the Marlboro Man*, 24 N. KY. L. REV. 593, 600 (1997) ("Prior to 1996, there had been more than eight-hundred anti-smoking lawsuits filed, but the cigarette manufacturers had never paid a single dollar in damages."); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857-58 (1992) ("[O]ver a period exceeding thirty-five years, the tobacco industry never offered to settle a single case."); James C. Thornton, Comment, *The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers*, 76 KY. L.J. 569, 571 (1987-88) ("The tobacco industry has enjoyed a life of civil immunity in a world of products liability.").

55. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *aff'd on reh'g*, 350 F.2d 479 (3d Cir. 1965); *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963).

56. See, e.g., *Ross v. Philip Morris, Inc.*, 328 F.2d 3 (8th Cir. 1964); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), *questioned cert. on reh'g*, 154 So. 2d 169 (Fla. 1963), *and rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *and rev'd and remanded on reh'g*, 391 F.2d 97 (5th Cir. 1968), *and aff'd per curiam*, 409 F.2d 1166 (5th Cir. 1969).

57. See, e.g., *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541, 542 (5th Cir. 1970) (affirming summary judgment for defendant on the ground that "an implied warranty under Louisiana law covers only knowable, foreseeable risks"); *Pritchard*, 350 F.2d at 486 ("We should

on failure to warn and defective design. But these efforts also turned out to be unsuccessful. For example, the United States Supreme Court concluded in *Cipollone v. Liggett Group, Inc.*⁵⁸ that failure to warn claims were expressly preempted by the Federal Cigarette Labeling and Advertising Act of 1966,⁵⁹ thus effectively foreclosing claims based on inadequate warnings. The courts have also rejected claims based on the notion that cigarettes were defective because the risks of such products outweighed their utility.⁶⁰

Class actions by victims of smoking have had mixed results. The plaintiffs in *Castano v. American Tobacco Co.*⁶¹ did not fare very well at all.⁶² The proposed class in *Castano* consisted of all nicotine-dependent persons in the United States and the estates, heirs, and survivors of deceased nicotine-dependent persons.⁶³ The plaintiffs alleged that the defendant tobacco companies fraudulently failed to inform consumers that nicotine was addictive and manipulated nicotine levels in cigarettes to maintain their addictive character.⁶⁴ The plaintiffs sought compensatory damages, punitive damages, payment of attorneys' fees, and other relief.⁶⁵ The trial court granted the plaintiffs' motion to cer-

emphasize that the medical researchers engaged by the defendant in 1952, apparently failed to detect the danger."); *Ross*, 328 F.2d at 12 ("[T]he trial court correctly charged the jury and properly refused plaintiff's instruction which would have made defendant an absolute insurer—without regard to 'reasonableness' and without regard to 'developed human skill or foresight.'").

58. 505 U.S. 504 (1992).

59. See 15 U.S.C. §§ 1331-1340 (1995).

60. See *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990) ("It is illogical to say that a product is defective in its generic form when 'defect' has historically been measured in reference to the availability, or at least the feasibility, of safer alternatives."), *vacated and remanded*, 505 U.S. 1215 (1992), and *judgment reissued*, 981 F.2d 7 (1st Cir. 1992); *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853, 859 (D.N.H. 1988) ("Therefore, this court rules that as a matter of law, the risk/utility theory of strict products liability as developed by Professor Wade, is not cognizable under New Hampshire law as applied to cigarette products."); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1159 (E.D. Pa. 1987) ("But this [risk-utility] doctrine, making the supplier an insurer of products the judge deems too dangerous to use, impermissibly allows judges to decide cases based upon their own views of social or personal utility."); *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189, 1192 (E.D. Tenn. 1985) ("[B]ecause of the language in comment i to section 402A of the Restatement (Second) of Torts, this Court finds that the plaintiffs did not make a *prima facie* case that the defendant's products are 'unreasonably dangerous.'").

61. 84 F.3d 734 (5th Cir. 1996).

62. See generally T. Dean Malone, Comment, *Castano v. American Tobacco Co. and Beyond: The Propriety of Certifying Nationwide Mass-Tort Class Actions Under Federal Rule of Civil Procedure 23 When the Basis of the Suit Is a "Novel" Claim or Injury*, 49 BAYLOR L. REV. 817 (1997).

63. See Robert T. Krebs, Note, *Castano v. American Tobacco Co.: Class Treatment of Mass Torts Is Going Up in Smoke*, 24 N. KY. L. REV. 673, 681 (1997).

64. See *Castano*, 84 F.3d at 737.

65. See *id.*

tify the class under Rule 23(b)(3);⁶⁶ however, class certification was reversed on appeal.⁶⁷ The federal circuit court concluded that the trial court had failed to adequately determine whether the proposed class action would be manageable in light of significant variations in state law.⁶⁸ The court also found that the class action failed to satisfy the superiority requirement of Rule 23(b)(3).⁶⁹

The plaintiffs in *Broin v. Philip Morris Cos., Inc.*⁷⁰ were somewhat more successful. In *Broin*, a Florida intermediate appellate court upheld the certification of a class action by thirty nonsmoking flight attendants against Philip Morris and other cigarette manufacturers.⁷¹ The proposed class consisted of approximately 60,000 present and former flight attendants who claimed that they were injured from exposure to secondhand smoke emitted by airline passengers.⁷² The appellate court concluded that the class was sufficiently large, that separate joinder of all of its members would be impractical, that the claims of class members raised common issues, that the claims of the class representatives were typical of those of other class members, and that the class representatives could adequately represent the interests of the other class members.⁷³ Later, while the case was being tried, the parties reached a settlement. The settlement provided that class members would receive no damages for their injuries; however, the defendants agreed to spend \$300 million for the study of smoking-related diseases.⁷⁴

Perhaps the most dramatic victory for anti-smoking forces involves a series of lawsuits by the states against tobacco companies to recoup the costs that smoking-related diseases have imposed upon Medicaid and other public health programs. Florida and Mississippi have taken the lead in this area.

In 1994, the Florida legislature enacted a statute designed to allow the state to recover Medicaid costs from third parties.⁷⁵ The statute created an independent cause of action and abrogated many of the defenses that would have been available in a traditional subrogation

66. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 553-58 (E.D. La. 1995).

67. See *Castano*, 84 F.3d at 752.

68. See *id.* at 741-44.

69. See *id.* at 746-51; see also Malone, *supra* note 62, at 832-34.

70. 641 So. 2d 888 (Fla. Dist. Ct. App. 1994), *review dismissed*, 676 So. 2d 1369 (Fla. 1996).

71. See *id.* at 889.

72. See *id.*

73. See *id.* at 889-92.

74. See *Tobacco Firms to Settle Flight Attendants' Suit*, N. Y. TIMES, Oct. 11, 1997, at A1.

75. See Medicaid Third-Party Liability, 1994 Fla. Laws ch. 94-251 (codified at FLA. STAT. ch. 409.910 (1997)).

action.⁷⁶ In 1995, the Governor ordered state officials to seek recovery of Medicaid expenditures, in accordance with the provisions of the Act, against tobacco companies. Industries affected by the Governor's order challenged the constitutionality of the statute. However, the Florida Supreme Court found most of the Act's provisions to be valid.⁷⁷

In 1994, the Attorney General of Mississippi filed suit in equity against the tobacco companies for recoupment of Medicaid payments and injunctive relief.⁷⁸ The complaint alleged that (1) the tobacco industry suppressed research about the addictive characteristics of nicotine; (2) cigarette companies manipulated and controlled nicotine levels in their products; and (3) tobacco companies conspired to evade state law prohibiting cigarette advertising directed at minors.⁷⁹ As the result of this conspiracy, many of its citizens became addicted to smoking and eventually developed health problems that required treatment under the state's Medicaid program.⁸⁰ After the Mississippi lawsuit was filed, a number of other states and cities followed Mississippi's lead and brought Medicaid recovery suits of their own against cigarette manufacturers.⁸¹

The Medicaid recovery litigation produced a number of embarrassing documents from tobacco company files,⁸² and a good deal of additional information began to emerge as the result of a settlement with Liggett in March 1996.⁸³ In order to avoid a massive legal and

76. See Fridy, *supra* note 8, at 240-45; see also Jonathan S. Massey, *The Florida Tobacco Liability Law: Fairy Tale Objections to a Reasonable Solution to Florida's Medicaid Crisis*, 46 FLA. L. REV. 591, 594-99 (1994) (discussing common law liability theories).

77. See *Agency for Health Care Admin. v. Associated Indus. of Florida, Inc.*, 678 So. 2d 1239, 1257 (Fla. 1996).

78. See Griffith, *supra* note 49, at 605.

79. See Karen E. Meade, Comment, *Breaking Through the Tobacco Industry's Smoke Screen: State Lawsuits for Reimbursement of Medical Expenses*, 17 J. LEGAL MED. 113, 132 (1996).

80. See Graham E. Kelder, Jr., & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 73 (1997) ("Moore's equity claims were grounded in the notion that the State of Mississippi had been injured directly by the behavior of the tobacco industry because Mississippi's taxpayers had been forced to pay the state's Medicaid costs associated with tobacco-related illnesses.").

81. See Cliff Sherrill, Comment, *Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution*, 19 U. ARK. LITTLE ROCK L.J. 497, 505 (1997) ("Since May 23, 1994, when Mississippi filed the first state claim attempting to recover from the tobacco industry based on Medicaid expenditures, numerous other states followed suit.").

82. See Meade, *supra* note 79, at 133-35 (stating that documents from Brown & Williamson demonstrated that tobacco companies suppressed information about nicotine addiction and manipulated nicotine levels in cigarettes).

83. See Fridy, *supra* note 8, at 235 n.3.

public relations disaster, the tobacco companies eventually negotiated a settlement agreement with the states in June 1997. Under the terms of the Settlement, the tobacco companies agreed to pay \$368.5 billion dollars to the states over the next twenty-five years. In addition, the tobacco industry gave up its fight against federal controls over nicotine and also agreed to accept severe restrictions on certain types of cigarette advertising. Private lawsuits against tobacco companies were not directly affected by the settlement.⁸⁴ So far, response to the proposed Settlement by public officials and health advocates has been somewhat less than enthusiastic and it is not clear whether Congress will enact the necessary legislation to implement it.

Some significant developments have occurred on the regulatory front as well. For example, the federal Food and Drug Administration ("FDA") has promulgated regulations to restrict the sale of tobacco products to minors.⁸⁵ FDA regulations also limit advertisements that reach children to black-and-white text-only formats,⁸⁶ prohibit tobacco advertising within a 1,000 foot radius of schools,⁸⁷ and bar tobacco companies from sponsoring sporting events.⁸⁸

All in all, the last few years have not been good for tobacco companies. Their traditional markets in the United States are declining,⁸⁹ and they face the prospect of massive tort liability and hostile regulation by government agencies. Tobacco companies and their customers are almost certainly going to have to pay for some of the costs of smoking-related injuries; the only question is how much they will have to pay and to whom.

III. POLICY CONSIDERATIONS

Loss-shifting rules promote various social policies. For example, loss-shifting may encourage a more efficient allocation of resources, or it may serve as a tool to spread primary accident costs. In addition, loss-shifting may be used to achieve corrective justice goals or it may serve a vindictory function. Unfortunately these social policies are

84. See *Tobacco Industry, Attorneys General Enter into Historic \$368 Billion Settlement*, 32 MEALEY'S LIT. REP.: INS., June 24, 1997, at 3.

85. See *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents*, 61 Fed. Reg. 44,396 (1996).

86. See 21 C.F.R. § 897.32(a) (1997).

87. See *id.* § 897.30(b).

88. See *id.* § 897.34(c).

89. See Erica Swecker, Note, *Joe Camel: Will "Old Joe" Survive?*, 36 WM. & MARY L. REV. 1519, 1521 (1995) (stating that the number of smokers has been declining steadily by one million consumers each year for some time).

not always consistent with each other. Therefore, one must make policy choices before choosing among various loss-shifting alternatives.

A. Resource Allocation

Loss-shifting may promote a more efficient allocation of resources by forcing firms to internalize the costs of dangerous products and activities. If producers are able to shift accident costs to others, they have little incentive to make their products safer. However, when they are forced to compensate injured parties, firms will spend more money on product safety as long as the marginal cost of safety measures is less than the marginal reduction of expected liability costs.⁹⁰

Furthermore, even if a product cannot be made safer, liability rules that force the producer to internalize accident costs, can still serve a resource allocation function by increasing the cost of the product. This is desirable because the prices of goods ought to reflect the true costs of production in order to enable the market to allocate resources efficiently.⁹¹ If a producer is not required to pay the full costs of production, the price of its product will be artificially low. This, in turn, defeats the signaling function of prices, causing demand for the product (assuming that demand is responsive to price) to be higher than it would be if the product's price reflected its true production costs. This leads to overconsumption of the product.⁹² The costs of product-related injuries may properly be considered as a cost of production. If the costs of injuries are externalized, the prices of dangerous products will be artificially low, demand for such products will be artificially high, and product-related accidents costs will be higher than they should be. On the other hand, producers who are required to compensate injured consumers will be forced to raise their prices,⁹³ causing the prices of dangerous products to rise and the demand for

90. See James A. Henderson, Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 765, 768 (1983) ("[A] manufacturer will respond to threatened liability by investing in safety up to, but not beyond, the point at which the marginal costs of the investment equal the marginal costs of accidents thereby avoided.").

91. See Ellen Wertheimer, *Pandora's Humidor: Tobacco Producer Liability in Tort*, 24 N. KY. L. REV. 397, 407 (1997) ("From an economic standpoint, the correct price of a product should reflect all its costs. Only then can one accurately assess the level of demand for that product.").

92. See Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 104 (1994).

93. See Andrew O. Smith, *The Manufacturer and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 376 (1987) ("Under a strict liability regime,

such products to fall.⁹⁴ As consumption of dangerous products falls, so will the accident costs associated with such products.⁹⁵

B. Loss-Spreading

Some have suggested that the economic dislocation associated with product-related injuries (known as secondary accident costs) can be reduced if accident costs are spread among a large group instead of being borne entirely by individual victims.⁹⁶ The economic justification for this notion is the declining marginal utility of money theory according to which each additional dollar, as a person's wealth increases, provides less utility than the previous dollar.⁹⁷ The theory of loss-spreading assumes that overall utility is increased if the high-utility dollars lost by accident victims are replaced by lower-utility dollars provided by a large pool of loss-bearers.

In the case of product-related injuries, it is assumed that producers are generally in a better position to spread these losses than consumers.⁹⁸ Ordinarily, producers can compensate those who are injured by their products (either directly or through the purchase of

manufacturers will face a higher marginal cost curve and will correspondingly charge higher prices.”).

94. See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1273 (1991) (“[D]efect-free products liability would reduce the consumption of relatively risky products by increasing their monetary costs to users and consumers, thereby placing such products at a competitive disadvantage in the market.”).

95. See James A. Henderson, Jr., *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1040 (1980) (“[B]y causing the prices of products and services to reflect more fully their defect-related accident costs, strict liability helps to reduce . . . overconsumption and thus to reduce the overall costs of defect-related accidents.”).

96. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 794 (1985) (“Spreading the impact of loss over time or among a class of individuals will decrease economic dislocation, thereby reducing secondary costs.”).

97. See Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1794 (1995) (“That principle holds that, in general, the marginal utility a person derives from her first dollar is greater than the marginal utility the person derives from her second dollar.”); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 70 (1990) (“Most people believe that money is subject to declining marginal utility. That is, as a person's wealth increases, she derives less utility from each individual dollar.”).

98. See Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980) (“The manufacturer can spread risk through insurance and price adjustments, whereas the individual might suffer a crushing blow underwriting the loss himself.”); Kathleen M. McLeod, Note, *The Great American Smokeout: Holding Cigarette Manufacturers Liable for Failing to Provide Adequate Warnings of the Hazards of Smoking*, 27 B.C. L. REV. 1033, 1072 (1986) (“One of the principal purposes of the imposition of strict liability is to ensure that the injured party does not bear the cost of

liability insurance) and then pass the cost of compensation on to their customers in the form of higher prices.⁹⁹ Furthermore, because producers generally sell their products to a mass market, the incremental cost to each customer of compensating accident victims is likely to be quite small.¹⁰⁰

C. *Corrective Justice*

Some commentators believe that moral principles have an important role to play in the imposition of liability.¹⁰¹ One such consideration is corrective justice, which is concerned with rectifying wrongful gains and losses.¹⁰² The traditional concept of corrective justice is limited to cases of unjust enrichment, such as theft, where one party directly gained something at the expense of another.¹⁰³ In such cases, restitution satisfied the requirements of corrective justice by returning the property to its rightful owner and by depriving the wrongdoer of any ill-gotten gains.¹⁰⁴ Some theorists also felt that the concept of corrective justice required those who engaged in dangerous behavior to compensate those who were injured even though the wrongdoer did not directly profit from the victim's injury.¹⁰⁵ Thus, a tortfeasor who negligently caused a personal injury to another could be required to compensate the injured party. Today, principles of corrective justice

injuries caused by a defective product; rather, the manufacturer who can spread the cost among all consumers by pricing the product bears the cost.").

99. See Page Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966) ("The assumption is that the manufacturer can shift the loss to the consumers by charging higher prices for the products.").

100. See James B. Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 16 (1978) ("Since the retailer, manufacturer and others participating in the marketing chain possess a reasonably vast marketing public, the proportionate increase in cost to the public is theoretically minimal when compared to the loss suffered by the injured consumer.").

101. See, e.g., David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 430 (1993) ("At bottom, product accidents are moral—not technological events, and so the law of products liability should turn on moral theory in establishing its fundamental principles."); see also Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802-03 (1997) (discussing the corrective justice writings of George Fletcher, Richard Epstein, Jules Coleman, and Ernest Weinrib).

102. See Ausness, *supra* note 49, at 1093.

103. See *id.* at 1094 (discussing Aristotle's theory of corrective justice).

104. See Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 330 ("In most restitution cases—for example, when the defendant acquires property from the plaintiff by theft or fraud—there is both a loss to the plaintiff and a corresponding gain to the defendant. This correlation of gain and loss gives the restitutionary claim strong appeal in terms of fairness and corrective justice.").

105. See Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982).

have even been invoked to support the theory of enterprise liability under which businesses that engage in beneficial activities which necessarily impose risks on others are deemed to have a moral obligation to compensate those who are injured.¹⁰⁶

D. Vindication

Loss-shifting may act as a form of vindication for those who have suffered injury at the hands of a wrongdoer.¹⁰⁷ The adjudicative process provides a public forum for victims to tell their story and to receive comfort and emotional support from the community.¹⁰⁸ In addition, compensation may help victims of wrongdoing to overcome their sense of indignation and outrage.¹⁰⁹ Payments to accident victims can also reinforce community norms of conduct and rectitude by providing a degree of public accountability for those who violate them.¹¹⁰ In particular, moral values are strengthened when powerful violators, such as government institutions and large corporations, are held accountable.

IV. ALTERNATIVE LIABILITY SCHEMES

This section will evaluate various loss-shifting options in terms of their relative ability to achieve the policy objectives discussed in Part

106. See Fleming James, Jr., *An Evaluation of the Fault Concept*, 32 TENN. L. REV. 394, 399-400 (1965) ("This point of view, which may be called enterprise liability, is most simply stated by the proposition that an activity . . . should pay for the accident loss it causes because, as a general proposition, each enterprise in our society should pay its own way.").

107. See Steven D. Smith, *The Critics and the "Crisis": A Reassessment of the Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 783-85 (1987) (discussing the need to respond to the "sense of injustice" felt by accident victims).

108. See Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1218 (1990) ("This opportunity to speak and be heard about personal tragedy may be the most important feature of tort for accident victims, more important in some ways than obtaining monetary compensation."); Joseph W. Little, *Up With Torts*, 24 SAN DIEGO L. REV. 861, 869 (1987) ("Damaged people want compensation; there is no denying that. They also want accountability, which in a civilized society means access to a forum and a set of rules by which they may publicly prove themselves right and someone else wrong.").

109. See Ingber, *supra* note 96, at 781 ("Compensation may restore the plaintiff's sense of self-value, and erase his sense of outrage.").

110. See Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1227 (1993) ("This goal [of vindication] is achieved through compensating the victim, the sense of retribution and rectification that attaches to that compensation and the reallocation of loss that takes place."); Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 504 (1993) ("Tort law not only remedies injustice by imposing damage awards, it also exposes normative features of relations between parties by articulating and applying conceptions of responsibility.").

III. Potential ultimate loss-bearers include tobacco companies, smokers, and governmental providers of social welfare programs like Medicaid. Potential beneficiaries of such loss shifting include injured smokers, injured nonsmokers, and public social services providers.

A. Resource Allocation

Although smoking generates enormous health costs, many of these costs are externalized to nonsmokers.¹¹¹ Consequently, cigarette prices do not reflect the true cost of smoking to society. This causes economic resources to be misallocated because smokers spend money on smoking that they would otherwise spend for other purposes if cigarette prices were higher.¹¹² This inefficiency can be corrected by shifting smoking-related losses from individual victims to producers or consumers of cigarettes.

1. Tobacco Companies as Potential Loss-Bearers

Tobacco companies, who directly profit from the sale of cigarettes, appear to be ideal targets for loss-shifting. Those who might benefit from such loss-shifting include injured smokers, nonsmokers who are harmed as a result of exposure to secondhand smoke, and public institutions which provide free social services to injured smokers.

When individual smokers are injured, they are often left to bear their losses alone. These losses include uncompensated pecuniary losses such as lost employment income, fire losses, and health-care costs that smokers actually incur.¹¹³ Each year, these direct economic losses amount to many billions of dollars.¹¹⁴ Of course, smokers whose health is impaired by smoking are also afflicted by the pain and suffering associated with their diseases.

An argument, based on resource-allocation grounds, can be made for shifting these costs from injured smokers to tobacco companies. If

111. See Note, *supra* note 10, at 823 ("Those smoking-related health care costs not paid for by public programs are largely absorbed into private-sector loss spreading mechanisms—like pooled health insurance—and are consequently not reflected in the price of cigarettes or in other costs borne only by smokers.").

112. See *id.* at 824.

113. This Article treats smokers and first-party insurers as the same because such private insurers usually can recover claims paid to the victim by enforcing subrogation rights if the victim obtains compensation from a tortfeasor.

114. Estimates of the costs of smoking vary considerably. See Vandall, *supra* note 9, at 405-06 ("Cigarette smoking costs the nation more than \$52 billion annually in health care and lost productivity.").

the costs of smoking currently borne by injured smokers are shifted to tobacco companies, the price of cigarettes will rise substantially if tobacco companies pass these costs on to their customers. This, in turn, will cause the actual cigarette consumption rate to move closer to an efficient level.¹¹⁵

Injured nonsmokers are also appropriate beneficiaries of loss-shifting. Secondhand or sidestream smoke is known to contain high concentrations of harmful substances¹¹⁶ and, according to the Environmental Protection Agency and the Surgeon General, causes about 3,000 deaths to nonsmokers each year.¹¹⁷ In addition, many other nonsmokers are harmed, though not killed, as the result of exposure to secondhand smoke.¹¹⁸ At the present time, these costs are entirely externalized to nonsmokers. In theory, it would be entirely appropriate to require tobacco companies to assume responsibility for the health costs associated with secondhand smoke.¹¹⁹ Although the costs imposed on tobacco companies would be relatively modest, some increase in cigarette prices would still occur if tobacco companies were required to pay nonsmokers for the harm they suffer from secondhand smoke.¹²⁰

Finally, public social services providers can also assert a legitimate claim to compensation for the costs of providing health care to indigent smoking victims. Smoking imposes a tremendous financial

115. Of course, the consumption level would still be sub-optimal if nonsmokers and government entities continued to bear some of the costs of smoking.

116. See James W. Henges, Note, *Cigarettes: Defectively Designed or Just Extremely Dangerous?*, 18 OKLA. CITY U. L. REV. 559, 577 (1993) ("Sidestream smoke contains more than five times the ammonia, three times the carbon monoxide, and twice as much tar and nicotine than mainstream smoke.").

117. See U.S. DEP'T. OF HEALTH & HUMAN SERVS., U.S. ENVTL. PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1993); see also David B. Ezra, Note, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 SO. CAL. L. REV. 1061, 1065 (1990) (citing a study that attributed 2,490 to 5,160 lung cancer deaths a year to secondhand smoke exposure).

118. See Gregory P. Taxin, *Tobacco Industry Liability for Cigarette-Related Injuries: "Smokers, Give It Up!"*, 16 J. PROD. & TOXICS LIABILITY 221, 237 (1994) ("Moreover, smokers cause nonsmokers to suffer illnesses and diseases ranging from respiratory irritations to nonfatal heart diseases.").

119. See LeBel, *supra* note 35, at 486 ("A compensation program that was limited to environmental smoke victims would be easiest to justify on cost internalization grounds.").

120. Using a rough-and-ready method of calculation, I would attribute a cost of \$1 million per death for a total annual cost of \$3 billion for fatalities attributable to secondhand smoke exposure. Nontrivial health effects which do not result in death might account for another \$2 billion. The total cost, therefore, would be about \$5 billion. Assuming that 24 billion packs of cigarettes are sold annually, the cost of compensating nonsmokers would be about two cents a pack (plus the cost of operating the compensation mechanism).

burden on all levels of government.¹²¹ The cost to public programs, like Medicaid, of treating smoking-relating diseases has been estimated to be more than \$20 billion,¹²² and the overall cost to the government could be as high as \$50 billion.¹²³ A strong resource-allocation argument can be made that these costs should be shifted from government health-care providers to tobacco companies. This sort of loss-shifting will significantly increase the cost of cigarettes¹²⁴ and will thereby cause cigarette consumption to decline accordingly.

2. Smokers as Potential Loss-Bearers

The resource-allocation argument assumes that tobacco companies will ultimately pass on to smokers any health-care costs that are initially shifted to them. Thus, smokers, rather than tobacco companies, may be the ultimate bearers of any smoking-related losses that are initially shifted to tobacco companies. The potential beneficiaries of such loss shifting could be injured smokers, injured nonsmokers, and public providers of social services.

Injured smokers already bear some of the health-related costs of smoking, such as loss of employment income, pain and suffering, as well as health care costs that are not paid for by someone else. Arguably, these costs should be shifted from individual injured smokers to smokers-at-large. For purposes of an efficient allocation of resources, it does not matter whether smokers pay for smoking-related health costs in the form of higher retail prices or whether they pay an excise tax imposed at the time of sale. In either case, losses will be shifted to smokers in a way that affects cigarette consumption levels. As mentioned earlier, the health-care costs of smoking are sufficiently high that shifting them from individually injured smokers to smokers-at-large would have a significant effect on cigarette prices.

Perhaps injured nonsmokers should be compensated as well. If tobacco companies are held liable for injuries caused by secondhand smoke, one would expect them to raise prices accordingly. The same

121. See Meade, *supra* note 79, at 124-25.

122. See Michael K. Mahoney, Comment, *Coughing Up the Cash: Should Medicaid Provide for Independent State Recovery Against Third-Party Tortfeasors Such as the Tobacco Industry?*, 24 B.C. ENVTL. AFF. L. REV. 233, 238 (1996) (reporting that the cost of treating smoking-related illnesses to Medicaid and similar programs was 89 cents a pack times 24 billion packs of cigarettes).

123. See Fridy, *supra* note 8, at 237 (reporting that governments spend \$50 billion per year to treat smoking-related illnesses).

124. Shifting \$20 billion in public health care costs to 24 billion packs of cigarettes would result in a price increase of 89 cents a pack. See Mahoney, *supra* note 122, at 238.

result would presumably occur if these costs were recouped from smokers directly through some sort of direct tax or surcharge. In either case, the private cost of smoking would more closely resemble its social cost.

Public providers of social services may also make a claim to compensation under a resource-allocation rationale. Smokers currently externalize substantial costs to government health-care and social welfare programs.¹²⁵ Arguably, economic resources will be allocated more efficiently if these costs are reflected in the prices smokers pay for cigarettes.

3. Public Social Services Providers as Potential Loss-Bearers

Some legal scholars have proposed that accident costs, including those caused by defective or inherently dangerous products, be compensated by broad social welfare programs funded by general tax revenues.¹²⁶ Whatever the merits of such proposals, they would not, and are not intended to, internalize accident costs. To achieve a better allocation of resources, the smoking-related health-care costs must be borne by tobacco companies or smokers, not public social services providers. Therefore, if we wish to achieve a more efficient allocation of economic resources, smoking-related losses should not be shifted to public providers of social services; rather, such costs should be shifted from social services providers to tobacco companies and smokers.

4. Problems with the Resource-Allocation Rationale

The loss-shifting alternatives described above may have some potential drawbacks. For example, it is possible that additional cost-internalization is not necessary because existing excise taxes and high smoker mortality already offset the social costs of smoking. It is also possible that massive loss-shifting might destroy the tobacco industry. Another concern is that cost internalization will not lead to a more efficient allocation of resources because tobacco companies will not raise their prices. Conversely, consumer demand may be so inelastic that even substantial price increases will not affect cigarette consump-

125. See Note, *supra* note 10, at 823 ("Cigarette smoking imposes a massive burden on all levels of government, through the cost of government-sponsored health and welfare benefits, the loss of tax revenues due to illness and premature death, and the cost of supporting the families of smoking's victims.").

126. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 642-51 (1985) (proposing that tort law be replaced by expanded social welfare programs to pay accident victims for disability and medical expenses).

tion rates. Finally, higher cigarette prices may encourage consumers to abandon cigarettes for even more dangerous substitutes.

a. Unwarranted Shifting of Losses to Smoking

Assuming that the purpose of internalizing health-care costs is to assure that cigarette prices reflect the true social costs of production, it may be necessary to make some adjustments in order to prevent cigarette prices from actually exceeding the social costs of smoking. For example, the price of cigarettes already includes the cost of state and federal excise taxes. In the aggregate, these taxes exceed \$20 billion per year.¹²⁷ Any additional loss-shifting that occurred would have to take account of existing levels of taxation so that smokers would not be saddled with more than their share of the health-care burden.

A related argument assumes that the social costs of smoking are already fully internalized because smokers die sooner than non-smokers and, therefore, actually use fewer social services than non-smokers.¹²⁸ A recent study by the Rand Corporation concluded that smokers actually subsidize nonsmokers at a level of 68 cents per pack (in nondiscounted dollars) due to their higher mortality rates.¹²⁹ Even if costs and benefits are discounted, causing smokers to receive a net benefit of 38 cents per pack,¹³⁰ this benefit is more than offset by the excise taxes smokers pay to the government.¹³¹

b. Tobacco Company Bankruptcies

If smoking-related health care costs are shifted to tobacco companies or smokers, the resulting price increases may be so great that consumers will refuse to buy cigarettes and tobacco companies will go out of business. However, while the demise of the tobacco industry might have negative short-term economic consequences, in theory, the over-

127. See Jendi B. Reiter, *Citizens or Sinners?—The Economic and Political Inequity of "Sin Taxes" on Tobacco and Alcohol Products*, 29 COLUM. J. L. & SOC. PROBS. 443, 444 n.2 (1996).

128. See Taxin, *supra* note 118, at 239-40 ("Because smokers die earlier than nonsmokers, smokers pay more in social insurance taxes as a proportion of what they demand in payouts, require less collectively financed nursing home care, and draw less pension money."); Christopher May, Note, *Smoke and Mirrors: Florida's Tobacco-Related Medicaid Costs May Turn Out to Be a Mirage*, 50 VAND. L. REV. 1061, 1077-78 (1997) (discussing possible savings to government social programs due to the lower life expectancies of smokers).

129. See Willard G. Manning et al., *The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?*, 261 JAMA 1604, 1606, (1989).

130. See *id.* at 1608. This is because the health-care costs of smoking occur early, while the benefits to society from early death are postponed until later.

131. See Taxin, *supra* note 118, at 241.

all effect will be positive, assuming that tobacco companies go out of business because consumers are not willing to pay for the true cost of smoking. In other words, fears of tobacco company bankruptcy are irrelevant as far as resource-allocation goals are concerned.¹³²

c. Failure by Tobacco Companies to Pass Costs on to Consumers

Another concern is that tobacco companies will not pass on their increased production costs to consumers if smoking-related health-care costs are shifted to them. The American tobacco industry is a highly profitable,¹³³ six-firm oligopoly.¹³⁴ Unlike competitive industries, which would be forced to pass increases in production costs on to consumers, tobacco companies could afford to absorb some of the costs that are shifted to them and might choose to do so in order to maintain existing sales levels. If this occurred, cigarette prices would remain the same and consumption rates would not change.¹³⁵

However, there is a limit to the costs that tobacco companies can absorb in this fashion. If only the costs associated with secondhand smoke were shifted to tobacco companies, they might indeed be tempted to absorb some or all of these costs. However, if all of the health costs currently borne by injured smokers and government health-care programs were shifted to tobacco companies, they would certainly have to pass them on to consumers.

d. Inelasticity of Consumer Demand

The resource-allocation rationale assumes that cigarette consumption will go down if prices go up (unless a substantial consumer surplus exists in the existing price structure).¹³⁶ However, it is possible that the demand for cigarettes will not be responsive to price in-

132. See Wertheimer, *supra* note 91, at 406.

133. See Clara Sue Ross, Comment, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?*, 56 U. CIN. L. REV. 317, 332 (1987) ("The tobacco industry in the United States ranks among the top five industries in terms of sales, assets, and profits.").

134. See Reiter, *supra* note 127, at 462 ("The cigarette industry in America is essentially a six-firm oligopoly."). The tobacco cartel consists of R.J. Reynolds, Philip Morris, Liggett & Myers Company, American Brands, Lorillard Company, and Brown & Williamson Industries. See Ross, *supra* note 128, at 332. These six companies control 99.8% of the market. See Rimer, *supra* note 1, at 1270.

135. See Ausness, *supra* note 49, at 1111-12.

136. The difference between the price that consumers actually pay for a product and the price that they would be willing to pay is known as the consumer surplus. See Kim D. Larsen, Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045, 2054 (1984).

creases because smokers are addicted to smoking and cannot quit.¹³⁷ In fact, there is some evidence that older smokers do not change their smoking habits in response to price increases.¹³⁸ On the other hand, cigarette consumption by younger smokers does appear to decline as the price of cigarettes increases.¹³⁹ Thus, it is hard to say how much cigarette consumption rates will decline if cigarette prices are increased.

e. "Second Best" Problems

A final concern is that smokers will turn to cheaper, but more dangerous, substitutes for smoking if loss-shifting causes cigarette prices to rise.¹⁴⁰ This phenomenon is an example of the theory of the "second best." According to this theory, if government regulation or tort liability greatly increases the cost of a product or activity, consumers will seek unregulated substitutes that will be cheaper, but possibly more dangerous, than the regulated ones.¹⁴¹ For example, if cigarette prices rise, smokers may turn to bootleg cigarettes, smokeless tobacco products, or even illegal drugs.¹⁴²

B. Loss-Spreading

Loss-spreading is concerned with the prevention of secondary accident costs. This objective is best achieved by shifting losses from individual victims to those who can spread them more cheaply or efficiently.

137. See Ronald W. Eades, *A Comment on Professor Paul A. LeBel's Ideas for A Tobacco Injuries Compensation System*, 24 N. KY. L. REV. 495, 503 (1997) ("The fact that tobacco has an addictive nature, may encourage consumers to continue purchasing the product above a price that would have forced other products off the market.").

138. See Kenneth E. Warner, *Smoking and Health Implications of a Change in the Federal Cigarette Excise Tax*, 255 JAMA 1028, 1029 (1986).

139. See Ross, *supra* note 133, at 337 ("Most smokers begin smoking as teenagers or young adults and it is this age group that is most responsive to price changes and has the most elastic demand for tobacco.").

140. See Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423, 445-46 (1997).

141. See generally Henderson, *supra* note 95, at 1059-65.

142. Smuggling from the United States did occur on a large scale in Canada when the Canadian government increased the excise tax on cigarettes to \$4.44 a pack. See W. Kip Viscusi, *Promoting Smokers' Welfare with Responsible Taxation*, 47 NAT'L TAX J. 547, 555 (1994).

1. Tobacco Companies as Potential Loss-Bearers

The loss-spreading rationale arguably supports the shifting of smoking-related losses to tobacco companies.¹⁴³ The market for tobacco products is huge: almost 50 million Americans currently smoke and tobacco companies sell more than 24 billion cigarettes per year.¹⁴⁴ On the other hand, the number of smokers has been declining steadily for many years¹⁴⁵ and is likely to shrink even more as the result of government attempts to discourage cigarette sales to teenagers. Consequently, policymakers must acknowledge that there are limits to the tobacco industry's ability to pay for smoking-related injuries.

Injured smokers are obvious candidates for compensation under a loss-spreading rationale. As mentioned earlier, injured smokers currently bear many of the health-care costs of smoking, both pecuniary and nonpecuniary. Some of these losses are no doubt spread by first-party insurance, but many smokers, particularly those in lower socioeconomic groups,¹⁴⁶ do not have adequate private insurance.¹⁴⁷ Moreover, private insurance does not provide compensation for pain and suffering or other nonpecuniary losses that injured smokers incur.¹⁴⁸ Nonsmokers who are injured by secondhand smoke are in precisely the same position as injured smokers as far as loss-spreading considerations are concerned. Although many victims will be insured by private insurance companies, others may have to bear the cost of smoking-related injuries on their own unless their losses are shifted to tobacco companies.

Of course, many of those who suffer smoking-related injuries rely upon public health care and disability programs for assistance. It might seem desirable to shift these costs to tobacco companies as well. On the other hand, governmental institutions are excellent loss-spreaders themselves. They typically have significant financial resources and can use their taxing power to secure more money if

143. See Vandall, *supra* note 9, at 414 ("The reasoning behind reallocating the loss is that the cigarette manufacturer is in a better position than the nonsmoker and society in general to bear the damages caused by smoking.").

144. See Mahoney, *supra* note 122, at 235.

145. See Swecker, *supra* note 89, at 1521 ("In the United States, the number of smokers has declined steadily by one million each year.").

146. See Alan Schwartz, *Views of Addiction and the Duty to Warn*, 75 VA. L. REV. 509, 526-27 (1989) (stating that persons of low social and economic status are more likely to smoke than individuals at higher social and economic levels).

147. See Gangarosa et al., *supra* note 92, at 91 ("In recent years, the uninsured population has expanded to 37 million people.").

148. See Sugarman, *supra* note 126, at 648 ("[P]ain and suffering are generally not compensable from social-insurance, employee-benefit, or private-insurance schemes.").

needed. From the perspective of loss-spreading, therefore, it may be better to allow smoking-related health costs to fall on government health-care providers rather than shifting them to tobacco companies.

2. Smokers as Loss-Bearers

The argument for shifting smoking-related health-care costs to smokers is similar to the argument for shifting it to tobacco companies. Smokers constitute a large pool of potential loss-bearers and the activities of this group generates a need for compensation. As far as loss-spreading is concerned, it does not matter whether smokers pay for the health-care costs of smoking directly through taxation or indirectly through the payment of higher cigarette prices.

It seems appropriate to shift smoking-related losses from individual injured smokers to smokers as a group. Each smoker participates in an activity that is certain to harm some members of the group, and the group is large enough to absorb a significant amount of smoking-related losses. Smokers are also able to spread the health-care costs sustained by nonsmokers since injured nonsmokers are a much smaller group than injured smokers. Furthermore, it seems appropriate to place the responsibility for compensating injured nonsmokers on smokers because they are the physical cause of injuries suffered by nonsmokers. On the other hand, the loss-spreading rationale does not provide a convincing justification for shifting smoking-related losses from public social services providers to smokers when public entities are better loss-spreaders.

3. Public Social Services Providers as Potential Loss-Bearers

Because governmental entities are frequently good loss-spreaders, an argument can be made for requiring them to pay for at least some of the smoking-related health-care costs incurred by injured smokers. At the present time, the government already acts as a loss-spreader for veterans, indigent persons, and the elderly. On the other hand, moral considerations, to be discussed later, militate against a government-financed program that would compensate injured smokers in general.

4. Problems with the Loss-Spreading Rationale

Secondary accident costs can be minimized by shifting smoking-related health-care costs from injured smokers to those with greater resources or greater loss-spreading capacity. Tobacco companies, smokers, and public social services providers all have some ability to

spread losses. At the same time, many of the concerns discussed in connection with resource allocation goals are not relevant when the primary focus is on loss-spreading. For example, loss-spreading is not concerned with internalizing primary accident costs. Consequently, the best loss-bearer is not necessarily the one who has caused the losses. In addition, loss-spreading is not concerned with influencing consumption patterns.

However, some potential concerns must be addressed if loss-spreading is to be the principal rationale for liability. First of all, loss-spreading is concerned with the financial health of the loss-bearing enterprise because a firm that goes out of business cannot continue to function as a loss-spreader. In addition, "second best" issues are also troublesome because the loss-spreading capacity of an enterprise may be compromised if consumers turn to cheaper substitutes for the loss-bearing product or activity.

a. Tobacco Company Bankruptcies

The health-care costs of smoking are enormous. Even the most conservative estimates place these costs at \$50 billion per year.¹⁴⁹ Even if we take the \$20 billion that tobacco companies and smokers already pay in taxes and devote it to loss-spreading, tobacco companies would still be required to provide another \$30 billion per year if they are expected to spread all smoking-related health costs. Given the fact that the U.S. market for cigarettes is already shrinking,¹⁵⁰ one might legitimately question whether tobacco companies and smokers have the ability to spread all of these costs.

It is important to note the difference between resource allocation and loss-spreading perspectives on this issue. When the principal concern is resource allocation, it is all right if a company, or even an entire industry, goes out of business when it cannot pay for the costs it imposes on society. However, the situation is entirely different when the primary concern is loss-spreading. An enterprise that has gone out of business or has become financially troubled will not be able to spread losses.¹⁵¹ Consequently, if tobacco companies or smokers are

149. See Vandall, *supra* note 9, at 405-06 (estimating health care and productivity losses at \$52 billion).

150. See Swecker, *supra* note 89, at 1521 (stating that the number of smokers is declining by one million each year).

151. See Ausness, *supra* note 49, at 1120 ("[I]f the tobacco industry experienced severe economic decline, or went out of business altogether, it would no longer be able to spread losses.").

expected to act as loss-spreaders, the burden imposed upon them must not exceed their ability to pay.¹⁵²

b. "Second Best" Problems

The theory of the "second best" is also relevant to loss-spreading. If the price of cigarettes is significantly increased, smokers may seek cheaper substitutes. This is undesirable from a resource-allocation perspective because smokers might turn to even more dangerous substitutes. It is also undesirable from a loss-spreading perspective, because tobacco companies and smokers will be less able to spread smoking-related losses if the income from cigarette sales declines dramatically.

C. Corrective Justice

Moral considerations, such as corrective justice, may also support the shifting of smoking-related health-care costs from injured parties to those who benefit from smoking.

1. Tobacco Companies as Potential Loss-Bearers

Principles of corrective justice appear to support shifting some smoking-related losses from victims to tobacco companies. The first requirement for liability is that the defendant be guilty of some sort of wrongdoing. Unhappily for tobacco companies, the record is replete with evidence of morally reprehensible conduct. For example, although the tobacco industry was aware of the adverse effects of smoking as early as the 1960s,¹⁵³ it concealed this information from the public¹⁵⁴ and steadfastly denied the existence of any link between

152. See Ausness, *supra* note 140, at 447 ("Consequently, if cigarette companies are subjected to excessive liability, they may be unable to function effectively as loss spreaders.").

153. See McLeod, *supra* note 98, at 1059 ("A sufficient wealth of studies were performed and published between the early 1900's and the 1960's to put the tobacco industry on notice of the dangers inherent in cigarette smoking.").

154. See Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1452-53 (1994) ("[T]here is evidence that the cigarette industry as a whole has worked long and hard to conceal the true extent of the dangers of smoking.").

smoking and cancer.¹⁵⁵ Even today, cigarette advertising subtly suggests that smoking is consistent with an active and healthy life style.¹⁵⁶

Recent evidence also indicates that cigarette manufacturers have long been aware of the addictive qualities of nicotine. Yet, they not only suppressed this information,¹⁵⁷ also secretly manipulated nicotine levels in cigarettes, presumably in order to keep their customers addicted.¹⁵⁸ Finally, tobacco companies have intentionally directed their advertising and marketing efforts at underage consumers.¹⁵⁹ They know that most smokers take up the habit in their teenage or pre-teenage years.¹⁶⁰ Tobacco companies are also aware of the fact that individuals who begin to smoke before the age of eighteen are less likely to quit smoking and are more likely to remain smokers for life.¹⁶¹ Unfortunately, cigarette manufacturers have been extremely successful in their efforts to get young persons to smoke:¹⁶² more than 3 million teenagers smoke and another 1 million use smokeless tobacco.¹⁶³

At first blush, therefore, injured smokers appear to have a moral claim to compensation. Many smokers suffer severe health problems because of smoking, and as many as a third of them eventually die

155. See Krebs, *supra* note 63, at 676 ("Even after the [1964 Surgeon General's] Report, the tobacco companies claimed there was a lack of a direct causal link between smoking and cancers."); see also Ross, *supra* note 133, at 333 ("The tobacco industry still maintains that the causal link between smoking and disease has not been scientifically established.").

156. See Bruce A. Levin, *The Liability of Tobacco Companies—Should Their Ashes Be Kicked?*, 29 ARIZ. L. REV. 195, 238 (1987) ("Current ads continue leaving the unmistakable impression that smoking is desirable and even associated with healthy activities.").

157. See Griffith, *supra* note 64, at 607 (stating that state officials contend that cigarette companies suppressed information about nicotine addiction and manipulated nicotine levels in cigarettes).

158. See Meade, *supra* note 79, at 133-35 (stating that documents obtained from Brown & Williamson's files revealed the existence of such practices by the tobacco industry).

159. See Vandall, *supra* note 9, at 420 ("Cigarette marketing is aimed at the teen and pre-teen market, and their aim is accurate.").

160. See Levin, *supra* note 156, at 211 ("Many smokers begin their deadly addiction in their teenage years or even earlier."); Rimer, *supra* note 1, at 1242 ("Ten percent start smoking by the fourth grade and almost two-thirds start by the tenth grade.").

161. See Jennifer McCullough, Note, *Lighting Up the Battle Against the Tobacco Industry: New Regulations Prohibiting Cigarette Sales to Minors*, 28 RUTGERS L.J. 709, 719 (1997) ("[S]tudies have shown that if a smoker begins to smoke before the age of eighteen, then that individual will probably remain a smoker for life, but if a smoker begins later in adulthood, there is more of a chance that he or she will quit.").

162. See Kelder & Daynard, *supra* note 80, at 65 ("Cigarette advertising plays a preeminent role in encouraging children to smoke.").

163. See U.S. DEP'T. OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 5 (1994).

from smoking-related diseases.¹⁶⁴ Nevertheless, the moral situation of injured smokers is ambiguous. From the perspective of corrective justice, the strength of injured smokers' claims depends upon whether they are viewed as helpless victims of smoking addiction or as willing participants in a deadly lottery. According to the former view, tobacco companies, through the use of skillful marketing techniques prey upon vulnerable and naive teenagers and seduce them into smoking before they are fully aware of the consequences of their actions.¹⁶⁵ And once they begin to smoke, smokers cannot stop. The nicotine in cigarettes is highly addictive.¹⁶⁶ This is why so many smokers have tried to quit, but have failed.¹⁶⁷ If this view of smokers is accurate, one may argue that they should not be held morally responsible for their injuries.¹⁶⁸

However, it is also possible to argue that smokers have knowingly and voluntarily chosen to accept the risks associated with smoking.¹⁶⁹ The health risks of smoking have been matters of general knowledge since the 1960s¹⁷⁰ and perhaps even earlier.¹⁷¹ Moreover, studies

164. See U.S. DEP'T. OF HEALTH AND HUMAN SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, A REPORT OF THE SURGEON GENERAL 206 (1989) ("As many as one-third of heavy smokers aged 35 years will die before age 85 of diseases caused by their smoking."); Wertheimer, *supra* note 91, at 419-20 ("[T]here is evidence that tobacco products will kill one third of all persons who start smoking as teenagers.").

165. See Swecker, *supra* note 89, at 1519 ("Cigarette advertisements featuring a 'sunglass-sporting, phallic-nosed' camel named Joe, surrounded by his 'cool, jazz-playing, pool-hustling, poker-playing, cigarette-smoking crowd of camel friends,' have been accused of enticing children to smoke.").

166. See Kelder & Daynard, *supra* note 80, at 65 ("The nicotine in tobacco products is addictive."); McLeod, *supra* note 98, at 1055 ("Further, the medical profession has concluded that cigarette smoking is addictive."); Rimer, *supra* note 1, at 1243 ("Smoking cigarettes is as addictive as using heroin or cocaine."); Vandall, *supra* note 9, at 419 ("Careful examination of the data makes it clear that cigarettes and other forms of tobacco are addicting.").

167. See Henges, *supra* note 116 at 575-76 ("Of the 17 million who try to quit smoking each year, only 1.3 million are successful."); Rimer, *supra* note 1, at 1243 ("Once hooked, three of four smokers are sorry they started, and nine of ten have tried to quit at least once but failed.").

168. In the context of tort liability, this addiction claim is used to overcome the freedom of choice argument raised by the tobacco companies. See Rabin, *supra* note 54, at 871 ("The obvious tactic for countering the freedom of choice defense is a head-on rebuttal based on the addictive character of tobacco—a tactic that has come to be a central feature of the second wave litigation.").

169. See LeBel, *supra* note 35, at 483 ("One of the more distinctive features of tobacco-related harms is that the bulk of those harms occur to people who voluntarily begin to use the products which, at least for some time now, have been accompanied by warnings of the risks that these harms will occur.").

170. See Garner, *supra* note 11, at 271 ("The health consequences of cigarette smoking were well documented during the 1960s."); Note, *supra* note 10, at 813 ("Knowledge that smoking has potential health risks has become widespread in the two decades since the first Surgeon General's Report on smoking and the subsequent public debate over smoking's health hazards.").

show that most smokers, even young smokers,¹⁷² are aware of the general health risks of smoking.¹⁷³ Furthermore, it is by no means clear that nicotine is so addictive that smokers cannot quit smoking.¹⁷⁴ Nearly half of those who once smoked have successfully quit.¹⁷⁵ Consequently, the moral claim of injured smokers to compensation for smoking-related health costs may not be as strong as it first appears.

Injured nonsmokers and public social services providers, on the other hand, clearly occupy the moral high ground. Injured nonsmokers can claim that the risks associated with secondhand smoke have been discovered only recently. Therefore, one cannot say that injured nonsmokers are morally blameworthy for voluntarily exposing themselves to the risk of secondhand smoke exposure. And, of course, public social services providers have not contributed in any way to health problems caused by smoking and, thus, can make a strong moral claim to reimbursement for the costs of treating smoking-related diseases.

2. Smokers as Potential Loss-Bearers

The moral condition of smokers is quite different from that of tobacco companies. Smokers have not marketed dangerous products, nor have they concealed health-related smoking risks from the public. Instead, the moral claim of injured smokers rests on the notion that

171. See Rabin, *supra* note 54, at 856 ("But in a critical development, the most widely read magazine of the day, *The Reader's Digest*, long a foe of the tobacco industry, published a series of articles [in the 1950s] vividly translating the risks of smoking into terms everyone could understand.").

172. See Reiter, *supra* note 127, at 459 ("Ninety-nine percent of young people (ages seven to fourteen) know that smoking causes lung cancer."); Viscusi, *supra* note 142, at 553 ("Quite simply, the standard characterization of youths as being uninformed and ignorant of the risks they face is not in line with either the evidence with respect to smoking risks or recent studies on the psychology of risk perception.").

173. See Donald W. Garner, *Cigarette Dependency at Civil Liability of Cigarette Manufacturers: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1429 (1980) ("Just as the defendant can no longer claim he did not really know of the harm tobacco use can cause, the plaintiff can no longer claim that he is surprised at the detrimental effects of cigarette smoking."); Viscusi, *supra* note 142, at 552 ("Available evidence suggests that smokers are generally cognizant of the risks they face."). But see Henges, *supra* note 116, at 588-59 ("Many smokers began smoking prior to the 1960's, believing that it was safe, and they had no way of knowing that it was addictive.").

174. See Schwartz, *supra* note 101, at 521-22 ("[A]llegedly addictive substances such as tobacco and alcohol do not generate physical withdrawal costs that are so high as to overcome the will of an ordinary person to discontinue use when she comes to believe that the costs of consuming exceed the benefits.").

175. See Rabin, *supra* note 54, at 871 ("[T]he data indicate that about one-half of long-term smokers have managed to quit."); Taxin, *supra* note 118, at 225 ("Indeed, nearly half of all persons who were once regular smokers have successfully quit.").

smokers as a group, having benefited from smoking, have an obligation to compensate those who are injured in the course of an activity in which every member of the group has voluntarily participated.¹⁷⁶ Similar reasoning might be invoked to justify shifting smoking-related health costs from injured nonsmokers to smokers. Smokers as a group derive benefits from an activity that imposes losses on nonparticipants. In this sense, smokers have obtained a benefit at the expense of injured nonsmokers and ought to compensate them for these losses. Arguably, this reasoning also supports the reimbursement of smoking-related health care costs to public social services providers.

3. Public Social Services Providers as Potential Loss-Bearers

Requiring public social services providers to compensate injured smokers or injured nonsmokers has no moral basis. Public institutions are not responsible for the existence of smoking-related diseases, nor do they benefit in any way from smoking.

D. Vindication

Arguably, the conduct of some parties, particularly tobacco companies, may be such that loss-shifting is an appropriate means to vindicate the rights of injured parties.

1. Tobacco Companies as Potential Loss-Bearers

Considerable evidence shows that tobacco companies have engaged in a deliberate and continuous pattern of wrongdoing during the past three decades.¹⁷⁷ As mentioned earlier, they put a product on the market that they knew was dangerous;¹⁷⁸ they suppressed information about the health risks of smoking¹⁷⁹ and the addictive characteristics of nicotine;¹⁸⁰ and they manipulated nicotine levels in

176. See James, *supra* note 106, at 550 ("If a certain type of loss is the more or less inevitable by-product of a desirable but dangerous form of activity it may well be just to distribute such losses among all the beneficiaries of the activity though it would be unjust to visit them severally upon those individuals who happened to be the faultless instruments causing them.").

177. See Meade, *supra* note 79, at 133-35 (discussing evidence of tobacco industry wrongdoing revealed in Brown & Williamson Co. documents).

178. See McLeod, *supra* note 98, at 1059 (stating that the tobacco industry knew, or should have known, about numerous studies performed and published between the early 1900s and the 1960s that demonstrated the dangers of cigarette smoking).

179. See Wertheimer, *supra* note 91, at 1452-53 (proposing that the cigarette industry attempted to conceal the dangers of smoking from the public).

180. See Griffith, *supra* note 54, at 607 (stating that cigarette companies allegedly suppressed information about nicotine addiction).

cigarettes in order to keep their customers addicted.¹⁸¹ Tobacco companies also committed wrongful acts against injured smokers by withholding information that might have prevented their injuries from occurring. Arguably, a public trial, at which the wrongdoing of the tobacco industry is identified and condemned, will serve to vindicate community values of honesty and fair-dealing.

Alternatively, the claims of injured smokers for vindication are considerably weakened to the extent that they have freely and knowingly accepted the risks inherent in smoking. Injured nonsmokers, however, have a stronger vindicatory claim. Unlike injured smokers, nonsmoking victims of secondhand smoke did not contribute to their injuries in any way. They are morally innocent and thus in a good position to hold tobacco companies accountable for wrongfully subjecting them to injury. Public social services providers are also morally blameless. However, a vindicatory claim on their behalf does not seem particularly compelling because it is hard to picture public social services providers as victims.

2. Smokers as Potential Loss-Bearers

Although smokers may have a moral obligation to compensate those who are injured by smoking, there is nothing in their conduct that justifies the need for vindication. This is particularly true if we view smokers as victims of wrongdoing rather than as deliberate wrongdoers. Consequently, neither injured smokers, nor injured nonsmokers or public social services providers, need to seek vindication against smokers.

3. Public Social Services Providers as Potential Loss-Bearers

Public social services providers are not culpable and, therefore, cannot be held liable on the basis of any vindicatory interest on the part of injured smokers or nonsmokers.

E. Conclusion

If resource allocation goals are important, tobacco companies and smokers, and not public social services providers, should legitimately be required to compensate all injured parties. However, various forms of market failure may defeat this objective and make things even worse from the resource allocation perspective. Therefore, it

181. See Meade, *supra* note 79, at 133-35 (proposing that tobacco companies controlled nicotine levels in cigarettes).

will be necessary to exercise a degree of caution when shifting losses in order to allocate economic resources more efficiently.

If loss-spreading is the principal objective, we can look to tobacco companies, smokers, and public social services providers to compensate injured smokers and injured nonsmokers. However, it is probable that neither tobacco companies, nor smokers, will have sufficient resources to spread all of the health-related costs that smoking imposes upon society.

An obligation on the part of tobacco companies to provide compensation may also arise under principles of corrective justice because of prior wrongdoing. Although the corrective justice claims of injured smokers are a bit dubious, those of injured nonsmokers and public social services providers appear to be quite strong. Smokers may also be required to provide compensation to injured smokers, injured nonsmokers, and public social services providers on the theory that smokers, have received a benefit from a dangerous activity and, therefore, can be expected to help participants and bystanders who have been injured as a result of their activity.

Finally, smokers and nonsmokers may seek compensation against tobacco companies for their injuries in order to vindicate principles of public morality. At the same time, lack of culpability would probably preclude such claims against smokers and public social services providers.

V. A PROPOSED COMPENSATION PLAN

In this portion of the Article, I propose a plan whereby the federal government would reimburse public health-care providers for the costs of treating indigents for smoking-related diseases. The plan would make no provision for the compensation of individual smokers. A federal compensation board would administer the program and have the power to promulgate eligibility standards. The program would be financed by an increase in the existing cigarette excise tax.

A. *Tort Liability Versus an Administrative Compensation Scheme*

Some commentators contend that tobacco companies should be held liable under principles of strict tort liability, just like other sellers of defective products.¹⁸² In theory, the imposition of tort liability

182. See McLeod, *supra* note 98, at 1056 ("Courts should hold the tobacco industry, as manufacturers of the most harmful product on the market today, to the same strict liability standards as any other industry in the United States.").

upon tobacco companies will lead to a more efficient allocation of resources by ensuring that smoking-relating health-care costs are borne by those who benefit from the marketing of cigarettes.¹⁸³ Tort liability should also provide a source of compensation for smoking victims, thereby spreading smoking-related losses more fairly.¹⁸⁴ Tort liability may also act as an instrument to achieve corrective justice¹⁸⁵ or vindicatory¹⁸⁶ goals.

However, there are a number of problems with using tort law as a mechanism for shifting smoking-related losses. First of all, because any injured party can bring a tort action, there is no way to control either the size or number of claims that may be brought against tobacco companies. This means that tobacco companies would face the prospect of crippling liability. To make matters worse, existing tobacco companies would also face severe competition from new cigarette producers who could sell their products for less because they would not be liable for injuries caused by past cigarette sales.¹⁸⁷ If the combined effect of massive liability and declining markets forced existing tobacco companies to go out of business, victims would be left with no source of compensation.¹⁸⁸

An even greater concern is the cost of tort litigation.¹⁸⁹ In general, tort victims receive only about half of the money producers and insurers pay out to settle claims or judgments, while litigation costs account for the remaining half.¹⁹⁰ In contrast, other compensation

183. See Ausness, *supra* note 49, at 1087.

184. See Note, *supra* note 10, at 821 ("The industry's ability to spread the costs of smokers' losses among all who benefit from tobacco manufacture and consumption suggests that imposing liability on the industry would lead to a more equitable sharing of the burdens than is currently the case.").

185. See Owen, *supra* note 96, at 430.

186. See Little, *supra* note 103, at 869.

187. See Ausness, *supra* note 140, at 447.

188. See *id.* New entrants into the market might attempt to limit their tort liability by deliberately planning to go out of business before the health claims of their customers begin to mature. See Taxin, *supra* note 118, at 247.

189. See generally Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 686-87 (1997) (discussing the high cost of tort litigation).

190. See Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479, 492 (1987) ("[O]verall, plaintiffs appear to receive, in net compensation, about fifty percent of tort litigation expenditures."); Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 35 (1988) ("Reduced to a single figure, injury victims were receiving slightly less than half of every dollar expended by the system on accident claims.").

systems, such as private insurance, workers compensation, and Social Security, cost much less to operate.¹⁹¹

For these reasons, tort law appears to be too crude and expensive to serve as an effective mechanism for the compensation of smoking-related health claims. In contrast, statutory compensation schemes appear to be more attractive than tort law. They are much cheaper to operate, and they can be designed to achieve narrowly targeted objectives. My proposal will involve a statutory compensation program managed by a federal administrative agency.

B. Policy Considerations

Possible loss-bearers under this proposal include tobacco companies and smokers. Technically, tobacco companies would pay the excise tax at the production stage; however, I assume that all or most of the tax would ultimately be passed on to smokers. The only beneficiaries under this proposal would be public social services providers.

While the principal policy justification for this proposal is corrective justice, the increased excise tax might also have beneficial effects on resource allocation as well.¹⁹² In Part IV, I concluded that it was consistent with accepted principles of corrective justice to shift smoking-related losses to tobacco companies. Tobacco companies have not only profited from an injury-producing activity, but they have engaged in active wrongdoing. While smokers are not morally culpable like tobacco companies are, they have voluntarily participated in, and benefited from, an activity that they know harms others. Consequently, I believe that principles of corrective justice can be invoked to impose a legal duty on smokers to compensate some of those who are injured by smoking.

The potential beneficiaries under this scheme include injured smokers, injured nonsmokers, and public social services providers. Arguably, all injured smokers and nonsmokers should be able to assert a claim on corrective justice grounds to compensation for smoking-related injuries. Without denying the legitimacy of these claims, I

191. See Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in *TORT LAW AND THE PUBLIC INTEREST* 127, 135 (Peter H. Schuck ed., 1991) ("[T]ransactions costs consume 30 percent of the costs of the workers' compensation system, 15 percent of health insurance, and just 1 percent of the social security system.").

192. A significant price increase might not affect the smoking habits of adult cigarette smokers, but it might discourage younger individuals from beginning or continuing to smoke. See Ross, *supra* note 133, at 337. If young people reduced their consumption of cigarettes, the market for such products would eventually decline as older smokers died off. See Nelkin, *supra* note 7, at 340.

would argue that public providers of social services, or rather the non-smoking taxpayers who enable them to provide these services, have the strongest corrective justice claim. Nonsmoking taxpayers contribute a disproportionate share to the maintenance of publicly financed health care programs such as Medicaid.¹⁹³ This is because non-smokers seldom require treatment for smoking-related illness. Smokers, on the other hand, not only require treatment for such illnesses, but also tend to rely more upon public health care programs than nonsmokers.¹⁹⁴

C. *Eligibility Requirements*

If the proposed compensation scheme cannot afford to compensate everyone who is injured by smoking, it will be necessary to impose some restrictions on eligibility.

1. *Restrictions on Eligible Beneficiaries*

In theory, the proposed compensation system could provide benefits for everyone who has been injured by smoking. This would include injured smokers, injured nonsmokers, and public providers of social services. However, I believe that it would not be practical to provide full compensation to all of these claimants.

First of all, a program that attempted to compensate everyone would require at least \$50 billion and possibly as much as \$100 billion, per year to operate, depending on the level of compensation provided by the program. Assuming that 24 billion packs of cigarettes are sold each year, a \$50 billion compensation program would require an excise tax of more than \$2 a pack, while an excise tax of \$4 a pack would be needed to finance a \$100 billion program. I do not believe that the tobacco industry could survive if excise taxes of this magnitude were suddenly imposed on the sale of cigarettes.

In addition, compensating all injured parties would require the creation of a large federal entitlement program. More than 450,000 persons die each year from smoking-related diseases¹⁹⁵ and millions of others are seriously injured as a result of smoking. If each of these

193. See Garner, *supra* note 11, at 272-73 ("In short, the nonsmoking taxpayer, who generally lives a longer, healthier life than the average smoker, will draw fewer benefits from and pay a disproportionately greater amount into welfare programs than the smoker.").

194. See Gangarosa et al., *supra* note 92, at 92-93 ("Heavy abusers of alcohol and tobacco are more likely to be poorly educated, underemployed and medically indigent.").

195. See Wertheimer, *supra* note 91, at 409-10 ("There is no other product which, when used as directed, kills some 450,000 Americans each year.").

victims were allowed to seek compensation, the costs of administering a program of such magnitude would be quite high, and the program would encounter enormous start-up problems. Therefore, it seems better to start with a more modest compensation program.

Assuming that the program could not compensate everyone who suffers a smoking-related injury, we must now decide who will be allowed to participate. Injured smokers seem to be the easiest group of potential claimants to eliminate. The sheer size of this class would overwhelm the program both financially and administratively. There are literally millions of injured smokers who would be eligible for compensation if their claims were allowed. But, as suggested earlier, it is doubtful that an excise tax would produce enough money to pay this many claims. The only alternative—other than drastically scaling back the level of compensation—would be to partly finance the program from general revenues. However, compensating smokers from general revenues would not be consistent with the program's corrective justice rationale. Not only are nonsmoking taxpayers innocent of any wrongdoing, but the claims of injured smokers are morally dubious.

In addition, the sheer number of potential claims by injured smokers militates against including smokers in the compensation pool. If individual smokers were allowed to seek compensation, the agency that administered the program would be swamped by claims and would be unable to process them in any sort of timely fashion. It is also expensive and time consuming to adjudicate highly individualized issues of fact, such as causation and damages. However, this problem would be unavoidable if individual smokers were allowed to submit claims to the compensation board.

Conversely, there is a strong argument for allowing injured nonsmokers to seek compensation. Approximately 3,000 persons are killed each year from exposure to secondhand smoke, and the number of those injured is likely to be relatively small as well. Consequently, a program that authorized claims by injured nonsmokers could easily be financed by an excise tax on cigarette sales and would not require substantial resources to administer. Moreover, injured nonsmokers are innocent of any wrongdoing and, therefore, can make a strong corrective justice claim to compensation.

However, one problem with including injured nonsmokers in the proposed compensation scheme exists. At the present time, it is difficult to determine when exposure to secondhand smoke causes injury. To avoid case-by-case adjudications of this nature, the compensation

board would have to establish a "rule-of-thumb" to determine what types of diseases could be attributed to secondhand smoke exposure. Furthermore, even if this were done, the board would still have to make individual determinations about other factual questions.¹⁹⁶

An excise-tax financed compensation program is ideally suited to reimburse public services providers for the costs of treating indigent smokers and nonsmokers. The program could be limited to health-care costs or expanded to include disability costs as well. The cost of such a program would be high, perhaps \$20 billion, but it would not be prohibitive. Probably the best approach, in terms of administrative convenience, would be to limit compensation to smoking-related Medicaid costs paid by the states. That way the board would only have to deal with fifty claimants.

2. Restrictions on Compensable Injuries

If individuals, such as injured nonsmokers, were allowed to seek compensation from the board, excluding nonpecuniary damages, such as emotional distress or pain and suffering, from the available recovery might be desirable. Although economic theory supports a ban on nonpecuniary damages,¹⁹⁷ the primary reason for limiting compensation to pecuniary losses is administrative efficiency. Nonpecuniary damages are subjective and require individualized fact-finding;¹⁹⁸ pecuniary damages, on the other hand, can be determined relatively easily by the application of objective criteria.¹⁹⁹

It may also be necessary to exclude or limit certain types of injury from consideration. For example, the statute may permit the board to pay for full treatment costs of diseases such as lung cancer, which is

196. For example, the board would have to determine whether the victim was a nonsmoker, whether the victim was exposed to secondhand smoke and, if so, whether this exposure was sufficient to cause injury. Furthermore, the board would have to determine whether the claimant's injury was caused by exposure to secondhand smoke, and the extent of the claimant's damages.

197. See Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1435 (1987) ("There is little reason to think that an optimal compensation scheme would include recovery for pain and suffering.").

198. See Andrew R. Klein, *A Legislative Alternative to "No Cause" Liability in Blood Products Litigation*, 12 YALE J. ON REG. 107, 125 (1995) ("First, the inclusion of nonpecuniary awards would increase the need for individualized fact discovery, diminishing the scheme's ability to provide compensation quickly.").

199. See Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 Nw. U. L. REV. 908, 910 (1989) ("Computation of 'special' damages—items of economic expense that plaintiffs must specifically plead and prove, like medical bills or wage loss—seem relatively straightforward and amenable to common-sense resolution without detailed jury instructions.").

almost entirely smoking-related. However, with other conditions, such as heart disease, which have numerous causes besides smoking, Congress might authorize the board to compensate for only a certain percentage of treatment costs. Not only would this avoid the cost of making individualized judgments about causation, but it would also allow Congress to control the overall size of the compensation program.

D. Funding

A compensation scheme, such as the one described above, can be financed in various ways. One option would be to rely on general funding. However, this would be inconsistent with corrective justice goals because the public rather than the tobacco companies and smokers would be required to bear the cost of smoking. Furthermore, funding from general revenue sources would not affect the price of cigarettes and thus would sacrifice the cost-internalization advantages that other methods of funding would provide. Finally, if only public social services providers were eligible for compensation, the program would amount to nothing more than a transfer of tax revenues from the federal government to state and local governments.

Another approach would be to impose civil liability on tobacco companies for smoking-related compensation costs paid out by the program. This would satisfy our corrective justice and resource-allocation concerns because some smoking-related health costs would be shifted to tobacco companies and smokers. However, this method of funding would require complicated administrative proceedings to ensure that tobacco company liability was determined in accordance with applicable standards of fairness and procedural due process.

An excise tax on cigarettes seems to be a better method of financing the compensation scheme. Congress has the constitutional authority to impose an excise tax on cigarettes and has done so for many years.²⁰⁰ Moreover, for all practical purposes, constitutionally imposed tax rates on cigarette manufacturers have no constitutional limit. Furthermore, the tax does not have to be used for any particular purpose. Thus, Congress could appropriately set the excise tax at a rate that would produce \$25 billion,²⁰¹ devote as much of this money as necessary to fund the compensation program, and use the rest for

200. See Nelkin, *supra* note 7, at 332 (discussing the history of tobacco product taxation).

201. See May, *supra* note 128, at 1087 (stating that an excise tax of 25 cents per pack would produce \$25 billion per year).

general revenue purposes. Finally, the excise tax rate can fluctuate to meet the revenue needs of the compensation program.

Although the compensation program proposed in this Article is a modest one, it will shift some of the costs of smoking back to smokers, it will be relatively simple and cheap to operate, and it will not put the tobacco industry out of business.

VI. CONCLUSION

The tobacco industry's long-standing immunity has come to an end. It is clear that tobacco companies and smokers are going to have to assume responsibility for a greater share of the health-care costs related to smoking. However, it is not clear how this will be done. My own view is that we should proceed cautiously. Therefore, I have proposed a relatively modest statutory compensation program as a possible first step.